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ABSTRACT

Legally sound assessment and selection processes in public schools must relate criteria to job requirements and must adopt procedures that are clearly articulated and uniformly applied to all candidates for a position. Legal challenges to school districts related to employment decisions can be grouped as allegations of (1) discriminatory practice, (2) violation of a substantive constitutional or statutory right, (3) unlawful arbitrary and capricious behavior, and (4) failure to fulfill procedural mandates. Three hypothetical scenarios introduce the basic legal issues that can arise in the assessment and selection process and are used to present a broad conceptual view of the process, while allowing for the identification of specific flaws that may be susceptible to legal challenge. The narrative that follows each scenario elaborates particular issues and offers a legal rationale that cites judicial decisions paralleling the hypothetical problem. To illustrate that compliance with the law can be realized, a sampling of cases in which school districts have prevailed against challenges to the assignment and selection process is presented. The importance of procedural safeguards and job-related criteria in the assessment and selection process are particularly evident in the nine concluding guidelines. (MLF)

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Joseph C. Beckham, J.D., Ph.D.

Legal Aspects of Employee Assessment and Selection in Public Schools

"Adverse consequences may implicate the individual's legally protectable interests and result in legal challenge."

1985 MONOGRAPH SERIES

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Reference to the school districts identified in the hypotheticals is purely fictitious and not meant to identify practices of any existing school board or its employees.

About the Author

Joseph Beckham is an attorney and member of the faculty of Florida State University's College of Education. A graduate of Florida's Holland Law Center, he has served for over twelve years as a consultant and legal counselor on matters of law and education to school districts, institutions of higher education, state departments of education, and various national organizations. Prior to completion of the Ph.D. in educational administration, he was counsel to Connecticut Lieutenant Governor Peter Cashman, state director of a comprehensive educational program for Connecticut juvenile offenders and a member of two legislative task forces which drafted legislation reorganizing programs serving the educational needs of Connecticut young people.

Formerly a graduate faculty member and policy consultant with the University of Pennsylvania's Higher Education Finance Research Institute, Dr. Beckham is now an associate professor of educational leadership at Florida State University and law editor of the *Journal of Education Finance*. His legal research studies have been published in law reviews and numerous professional education journals, including the *Journal of Education Finance* and the *Journal of Law and Education*. He annually reviews appellate decisions involving public schools for the *Yearbook of School Law* and Educational Research Service's series on *School Officials and the Courts*. His recent publications include an edited book titled *Legal Issues in Public School Employment* (Bloomington, Indiana: Phi Delta Kappa Foundation, 1983) and another monograph, *Legal Aspects of Teacher Evaluation* published by NOLPE.

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I.

Overview of the Process

Assessment and selection processes result in employment decisions which have consequences for all the parties. Adverse consequences may implicate the individual's legally protectable interests and result in legal challenge. Development and implementation of legally sound assessment and selection standards and procedures will not eliminate legal disputes, but should provide a documentary record which substantiates the fundamental fairness of the process, establishes a reasonable predicate for the employment decision, and elaborates the procedural integrity of the process. Since the litigation of employment disputes is often characterized by lengthy discovery and fact intensive inquiry, it is essential that a documentary record be maintained to provide a strong evidentiary base which will support the employment decision.

A school district's assessment and selection process is distinguishable from the summative evaluation process in that summative evaluation is designed primarily to provide a documentary record which justifies an adverse employment decision such as dismissal or nonrenewal.[1] While a record of performance evaluations may be used in the assessment and selection process, this process is more often characterized by a commitment to review a prospective candidate's credentials and performance and to select the candidate who is best qualified for a position. Further, the latter process may involve review of current employees for whom the employer may wish to offer formative evaluation and remedial or compensatory training in the course of implementing an assessment and selection program.

Three basic admonitions are critical to the development and implementation of the assessment and selection process in public schools. First, applicable criteria for assessment and selection should be reasonably related to job requirements. Second, procedures should be adopted, clearly articulated and uniformly applied to all candidates for a position. Third, the process, once developed, should not be

1. *See* J. Beckham, Legal Aspects of Teacher Evaluation (NOLPE Monograph 1982) and K. Frels & T. Cooper, A Documentation System for Teacher Improvement or Termination (NOLPE Monograph rev. ed. 1984).

compromised by considerations that are unrelated to the applicable assessment and selection criteria. These three admonitions emphasize the importance of definitive, reasoned standards for assessment and selection; consistent and uniform application of those standards to support the employment decision; and documentation of the adoption, application and outcome of those standards in the assessment and selection process.

Criteria

Adoption of criteria should be a high priority in development of the policy to guide the process. Criteria should conform to state statutory mandates, state and local board regulation and negotiated agreements. Where appropriate, state certification requirements, professional training, years of previous experience and other objective indices should be expressly stated in the adopted criteria. However, job-relatedness should be the principal consideration in adopting criteria and the employer must be prepared to articulate the relationship between a particular criteria and job-performance which will avoid a challenge of vagueness or ambiguity.

The criteria utilized in selection and assessment may include both objective and subjective factors. What is critical is not whether subjective judgments are made and ultimately relied upon, but whether the criteria on which the judgments are predicated were validity related to the requirements of the position, observable, and uniformly applied to all candidates.

Evidence

Evidence utilized in the assessment and selection decision cannot always be characterized as objective, but it can be relevant, credible and substantial. Such evidence should be reasonably related to the requirements of the position. It should be believable, supportable and neither illogical nor contradictory. Finally, the process should yield records which are substantial enough as to cumulative weight of information to justify the employment decision.

The failure to effectuate assessment and selection processes which yield relevant, credible and substantial evidence to justify employment decisions may lead to a system which utilizes announced "assessment and selection" procedures as a subterfuge for unlawful employment practices. Such a system can be manipulated such that employment decisions are predicated upon superficial or unrelated aspects of job

performance or job requirements. Under such circumstances, a court might conclude the employer fashioned a house of straw, which was unable to withstand the fresh breeze of judicial scrutiny.[2]

In implementing the process, a commitment to train observers and evaluators and to provide notice of both policy and procedures is essential. Involving employees in the implementation process will encourage formal and informal dissemination of criteria and procedures and can lead to feedback that modifies and enhances the existing system.

Finally, the assessment and selection process should be formalized through written policies defining criteria related to job requirements and specifying procedures which inform applicants and guide the process. Formalized policies should include the maintenanace of a permanent record system in order to document the events and activities in the assessment and selection process.

2. *See* Hollingsworth v. Board of Educ., 303 N.W.2d 506 (Neb. 1981).

II.

Legal Aspects of the Process

Assessment and selection of school personnel is a factor in administrative decisions related to hiring, reassignment, promotion, determination of merit and grant of tenure or continuing contract. If responsible administrators do not have reasoned, ascertainable standards for making these determinations, or if they fail to apply those standards in the particular employment decision, the intervention of courts can be expected. While judges are reluctant to interfere in the employment decisionmaking process traditionally reserved to the local school board, judicial review can be anticipated when agency decisions are deemed arbitrary or capricious, lack substantial supporting evidence or deny the individual's constitutionally or statutorily protected rights.

Employment disputes involving selection and assessment have not been litigated with the same frequency as cases involving summative evaluation. One reason for the difference in actual cases is the overt nature of the evaluation process, which often involves state or district policy mandating regular evaluation and an opportunity for employee challenge to the substance or procedure utilized in the process. Another reason for the large number of cases involving summative evaluation is that by its nature, this evaluation process influences the outcome of an adverse employment decision which would have injurious consequences for the employee's existing status.

However, a growing body of case law has focused on or closely paralleled legal aspects of the assessment and selection process in public schools. These cases involve challenges to the policies or procedures utilized by school districts to select an applicant for an employment position. In the vast majority of cases which are appealed, the challenge relates to allegations of discriminatory practice. However, it is possible to construct a situation in which the violation of a substantive constitutional or statutory right would be at issue. Another area of challenge to school board discretion involves allegations that the board failed to develop or apply reasonable standards relative to the assessment and selection process and has thus been unlawfully arbitrary and capricious. Finally, a challenge to school board authority could emphasize the board's alleged failure to fulfill the procedural mandates required by constitution, statute, policy or practice.

Discrimination

Discrimination on the basis of race, religion, national origin, sex, age or handicap is prohibited under federal law and the provisions of many state laws.[3] The litigation of these discrimination claims is highly fact intensive whether in the context of administrative proceedings or in a trial at law. Documentation of assessment and selection processes is designed to provide a strong evidentiary basis for rebutting a claim of discrimination. Statements on applications, during interviews and throughout the process, which emphasize the school district's commitment to affirmative action and equal employment opportunity will reinforce the district's claim of nondiscrimination. Nothing can prevent charges of discrimination from arising, but summary disposition of the charges will be more likely where the selection and assessment process includes documentary records which support a strong anti-discrimination posture.

Most cases involving allegations of discrimination in employment are brought under standards of proof applicable to Title VII of the Civil Rights Act.[4] In instances in which "disparate treatment" is alleged, the ultimate factual inquiry is whether the employer or its agents intentionally discriminated against the applicant.[5] While such a proof rests with the person bringing the claim, a three-step analysis of the alleged discrimination has been adopted which allows a claimant to meet a limited initial burden of proof by establishing that he or she applied and was qualified for the position, protected under provisions of the law and effectively denied the position. After this showing, the court will require the employer to articulate a legitimate nondiscriminatory reason for the hiring practice.[6] If the employer meets this burden of proof, the applicant must go forward with a showing that the articulated reason is a pretext masking the employer's actual discriminatory intent.[7]

School district employment decisions based upon unstructured personnel interviews and subjective criteria are often closely scrutinized by courts because of the potential for masking unlawful discrimination. While the use of these techniques may not necessarily give rise to a *per se* finding of discriminatory intent,[8] it is highly probable

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3. *See, for example*, 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964), 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973), and 29 U.S.C. § 1976 (Title IX of the Educational Amendments of 1972).
4. 42 U.S.C. § 2000e 5(e).
5. Texas Dep't of Commun. Affairs v. Burdine, 450 U.S. 248 (1981).
6. *Id.*
7. United States Postal Service v. Aikens, 103 S. Ct. 1478 (1983).
8. *See* Love v. Alamance Cty. Bd. of Educ., 581 F. Supp. 1079 (M.D.N.C. 1984).

that the school district will be compelled to detail its selection procedures and establish that all the applicable subjective criteria were job-related and the unstructured personnel interviews were uniform for each applicant. Further, the school district must articulate the basis for its employment decision in a manner which will lend credence to the view that no discriminatory animus influenced the selection process.[9]

While overt discrimination in assessment and selection processes is prohibited by the disparate treatment provisions of Title VII and related federal laws, Title VII also provides for a discrimination claim based on employment practices that appear fair, but discriminate in actual practice.[10] In a Title VII claim based upon allegations of disparate impact, the claimant is required to show that a facially neutral policy has a disparate impact in application to a protected minority. If established, the school district would be required to show that the policy is manifestly related to the employment in question and valid for the purpose intended. In essence, the school district would be required to show a "business necessity" for the challenged practice, carrying a rigorous evidentiary burden to establish the practice did not constitute an artificial, arbitrary and discriminatory barrier to those denied employment.[11]

The use of a minimum requirement score on a nationally standardized test as a basis for employment decisions in a school district has been a legal issue under the provisions of "disparate impact." In the leading case, the use of a minimum score requirement on the National Teacher's Examination (NTE) to make certification decisions and salary level determinations regarding public school teachers was upheld by a three-judge federal district court notwithstanding the substantial adverse effect of the test requirement upon black applicants for certification.[12] In another case, teacher pay raises based upon high scores on the NTE were not considered a denial of rights under the disparate impact standards of Title VII since the policy had a legitimate objective in attracting highly rated teachers to the school district and creating incentive to improve teachers' knowledge of education.[13] However, the school board's adoption and use of a minimum score requirement on a standardized test as a prerequisite for

9. Parker v. Board of School Comm'rs of Indianapolis, 729 F.2d 524 (7th Cir. 1984).
10. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
11. Washington v. Davis, 426 U.S. 229 (1976).
12. United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).
13. Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).

employment or as a reemployment criterion is still subject to legal challenge. Courts point to the unvarying history of adverse racial impact associated with such tests and "test developers'" disclaimers which discourage use of the tests as a criterion in assessing employee effectiveness.[14] Further, the use of arbitratory cut-off scores in applying the test, often without investigation of the potential harmful consequences to a minority group, is a highly suspect and vulnerable procedure.

Violation of First Amendment Rights

A school district might well be required to carry the burden of proof to justify an assessment and selection process which is found to have violated the applicant's constitutionally protected rights under the first amendment. When activity protected under the amendment is found to be a substantial or motivating factor in the school board's decision to deny employment, a *prima facie* first amendment violation is established and the burden shifts to the school district to prove that the applicant would have been denied employment notwithstanding consideration of the protected activity.[15] While appellate cases involving assessment and selection are rare, standards applicable to situations involving the evaluation of employees may provide guidance for the assessment and selection process.

Evidence that an applicant was denied employment because of an exercise of first amendment rights may often be contained within the assessment report utilized to make selection decisions. Statements which indicate the applicant is not to be hired because of his or her public remarks concerning board policy may so implicate constitutional rights as to justify judicial scrutiny.[16] A personnel advisory committee's primary reliance upon a negative evaluation in which the applicant was characterized as "unprofessional" because of activity as a union representative would be similarly suspect.[17] Evidence that a school committee's decision not to hire an applicant for a vacant position was motivated by a desire to punish the applicant for partisan political activities related to school board affairs might so implicate constitutional rights to free speech and association as to compel court intervention.[18]

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14. *See* York v. Alabama State Bd. of Educ., 581 F. Supp. 779 (M.D. Ala. 1984).
15. *See, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); and Pickering v. Board of Educ., 391 U.S. 563 (1968).
16. *See* Winston v. Board of Educ. of South Plainfield, 319 A.2d 226 (N.J. 1974).
17. *See* Columbus Educ. Ass'n v. Columbus City School Dist., 623 F.2d 1155 (6th Cir. 1980), and Hickman v. Valley Local School Dist., 619 F.2d 606 (6th Cir. 1980).
18. *See* Smith v. Harris, 560 F. Supp. 677 (R.I. 1983).

Arbitrary and Capricious Action

While the level of scrutiny involved in judicial review of a school board's assessment and selection decision is not clear, it may be presumed that courts will be reluctant to interfere with the daily hiring, promotion and assignment directives of a school district. These decisions, where based upon criteria validly related to job requirements and ostensibly free of impermissible discrimination or first amendment restraints, are arguably outside the expertise of judges.[19] To conclude otherwise would compel judicial supervision and review of a host of subjective factors used by professional educators to make delicate comparisons between applicants for positions, a role courts have neither the competency nor the resources to undertake.[20]

While it is unlikely that an applicant could effectively challenge a school board selection decision based solely upon the contention that the process did not result in the identification of the best candidate, it is possible that a school board's failure to provide evidence to support a reasonable basis for a selection decision could be litigated. In cases involving adverse employment decisions school authorities have been successfully challenged for failure to establish and publish evaluation criteria,[21] lack of specificity and inadequate documentation of employment decisions,[22] and failure to follow required evaluation procedures specified by state law and regulation.[23] Failure to adopt and apply the same assessment standards to all applicants or candidates for a position will often raise a legal inference of arbitrary treatment, particularly when coupled with evidence of discrimination.[24]

Denial of Due Process

The due process clause of the fourteenth amendment has not been interpreted to guarantee protection from personnel decisions that are incorrect or ill-advised.[25] Further, a school board's adoption of guidelines to govern the assessment and selection process has not been held to guarantee a particular applicant's selection.[26] However, the adoption of procedures to guide the assessment and selection process and the elaboration of job-related criteria upon which selection will be based

19. *See* Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979).
20. *See* Kramedas v. Board of Educ. of Christina, 523 F. Supp. 1268 (D. Del. 1981).
21. Hyde v. Wellpinit School Dist., 611 P.2d 1388 (Wash. App. Ct. 1980).
22. Munger v. Jesup Commun. School Dist., 325 N.W.2d 377 (Iowa 1982).
23. Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).
24. *See* Harkless v. Sweeny Indep. School Dist., 554 F.2d 1353 (5th Cir. 1977).
25. *See generally* Bishop v. Wood, 426 U.S. 341 (1976).
26. *See* Kramedas v. Board of Educ., 523 F. Supp. 1268 (D. Del. 1981).

can serve to establish those rudimentary elements of due process which could thwart an allegation that the school district has denied due process.[27]

The element of due process which appears most relevant to assessment and selection is notice. Adequate notice would include a statement identifying the position vacancy coupled with a description of the jobs and the qualifications for the position. Notice would also extend to the articulation of procedures applicable to the selection process and sufficient specificity in the elaboration of assessment standards so as to inform a reasonably prudent person of the applicable criteria.

27. *See* Needleman v. Bohlen, 602 F.2d 1 (1st Cir. 1979).

III.

Three Hypothetical Scenarios

Three hypothetical scenarios introduce the basic legal issues which can arise in the assessment and selection process. The use of these hypothetical scenarios permits a broad conceptual view of the process, while allowing for the identification of specific flaws which may be susceptible to a legal challenge. The narrative which follows each scenario elaborates particular issues and offers a legal rationale which cites judicial decisions paralleling the hypothetical problem.

In reviewing each scenario, emphasis should be directed to the three principal aspects of a legally defensible assessment and selection process. Have procedures and criteria for assessment and selection been identified and implemented? Can the criteria which appear to influence the assessment and selection process be shown to reasonably or rationally relate to job requirements? Is there evidence of fair and uniform application of standards and procedures?

Case Scenario One

Mayfair School District

The Mayfair School District's job requirements specified that the successful applicant must have certification in counseling and French at the secondary level to qualify for the high school counseling position. Actual duties associated with the position did not require that the successful applicant teach or tutor in French, nor was there any evidence that the requirements of the counseling position required training or certification in that language. A position announcement was not listed until after the position had been filled by a male applicant previously employed within the district.

Despite the fact that the position had already been filled, a female applicant for the position was interviewed by a select personnel advisory committee to the board. This committee did not interview the male applicant who had already been selected for the position, but did report the male applicant would be superior to the female on the basis of personal character, tact and the ability to work cooperatively with others. The committee also reported that the female applicant was a single parent with two

children—a factor which would make it unlikely that she would be available to work the long hours and demanding schedule associated with the counseling position.

The Mayfair Superintendent supported the recommendation of the committee, noting that the female applicant was not certified in French and might encounter problems in working with the local high school principal, described by the superintendent as an "administrator who has difficulty working with women."

Narrative

The Mayfair School District is vulnerable to a number of legal challenges. The rejected female applicant might reasonably question the relevance of inquiries which appear to emphasize her family responsibilities and imply sexual stereotyping, particularly when there is no evidence that similar inquiries were addressed to the male applicant. Evidence of preselection, coupled with a job description that appears tailored to a particular applicant rather than to school district personnel needs, may be perceived as arbitrary, and, when coupled with other indica of discriminatory practice, such as the attitudinal disposition of the local school principal, might establish a *prima facie* violation of Title VII. The school district's failure to apply uniform procedures and establish evidence of reasonable comparisons between applicants implicates both due process and disparate treatment claims, particularly when subjective factors as difficult to define as "tact" and "personal character" appear to be influential in the personnel decision.

Scenario One is based in part upon a case in which evidence of preselection and the use of subjective promotion procedures were given close scrutiny by the Eighth Circuit Court of Appeals. In this Title VII sex discrimination case, the school district was held to have unfairly emphasized a female teacher's family responsibilities as a factor in denying her a position as director of a teacher center. In overturning, as clearly erroneous, the district court's finding that the school district had met its burden to articulate a legitimate, nondiscriminatory reason for nonrenewal, the court noted that the school district superintendent made his employment decision on the basis of a sexual stereotype and held that the employer's reasons were pretexts for discrimination.

Persuasive evidence of preselection in filling a school counseling position led the same court to find that the school district had engaged in a discriminatory practice with regard to the assignment of a counselor to fill a vacant position. Testimony undisputed by the school district tended to show that the position had been filled by a male applicant and the job requirement, certification in counseling and in French, was

carefully tailored to fit the single male applicant within the district. The evidence of preselection effectively discredited the school district's proffered explanation for selecting the male applicant.[28]

In a similar case reminiscent of the Mayfair School District scenario, the Alaska Supreme Court upheld the findings of the State Commissioner for Human Rights that a certificated elementary school teacher was a victim of sex discrimination when she was denied a position as elementary principal. In selecting the male candidate for the position, the school board emphasized attributes such as "tact," "ability to deal with others," and "character" as factors weighed in favor of the male, but failed to demonstrate that they had asked whether the female applicant had comparable qualities. This failure to compare the qualities of the applicants, coupled with a history of selecting male applicants for principal and superintendent positions over a twenty-five year period, was sufficient to establish that there was substantial evidence of sex discrimination.[29]

An admission that an administrator had difficulty working with women can be an influential factor in a federal court's review of a discrimination complaint. The Ninth Circuit Court of Appeals overruled a federal district court's determination granting summary judgment in favor of a school district where the appellate court concluded that a genuine issue of fact existed as to whether a school principal's reassignment and subsequent discharge were the result of sex discrimination by the superintendent. The appellate court reviewed a record in which the superintendent's "attitudinal disposition" suggested difficulty in relating to women administrators and particular problems in working with the woman principal in the case. This evidence of a general disposition suggestive of sexism and animosity toward the principal might lead a jury to conclude that the real reason for reassignment and discharge was prejudice against women.[30]

Case Scenario Two

Bellview School District

The applicant, a blind tenured teacher with a previous history of a nervous breakdown, was denied placement on the Bellview School District's list of preferred administrative candidates after

28. Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982). *See also* Harrisburg School Dist. v. Commonwealth of Pa., 446 A.2d 760 (Pa. Commw. Ct. 1983).
29. Strand v. Petersburg Public Schools, 659 P.2d 1218 (Alaska 1983).
30. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).

receiving a low rating on a personnel interview and a low overall rating. The composite rating included the personnel committee's review of previous teaching evaluations and the recommendations of previous administrators with whom the applicant worked. In explaining the decision to refuse placement on the list of preferred candidates, the superintendent noted that the handicapped applicant's low composite rating was substantially due to a single negative evaluation by a former school principal with whom the applicant had worked. The negative evaluation indicated that the applicant had been contentious and difficult to work with during the two years in which the applicant had served as the building unit representative for the teacher's union. In addition, the superintendent pointed out that the applicant's previous history of psychiatric treatment and existing blindness would make it impossible for him to assume duties as a substitute bus driver, which was one of the requirements for any administrative position in the district.

Narrative

Section 504 of the Rehabilitation Act of 1973 is clearly implicated in this case scenario. The statute provides that

> [N]o otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program receiving federal financial assistance.[31]

The school district's proffered reasons for denying placement on the list of administrative candidates emphasize that even if the teacher had met rating requirements, he could have been denied placement because of his handicap and history of psychological disorder. Given the facts as presented in the scenario, it is likely the applicant teacher is an "otherwise qualified" handicapped applicant. Furthermore, the requirement that all district administrators qualify as school bus drivers is suspect as an arbitrary policy which effectively denies access to employment opportunities for certain categories of handicapped applicants.

Another aspect of the case scenario implicates the applicant's free speech and association rights as guaranteed by the first amendment. It is not surprising that a school principal would find his school's union representative contentious, since the union representative is normally

30. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).
31. 29 U.S.C. § 794 (1973).

required to pursue employee grievances as a zealous advocate. Nevertheless, where employment decisions, such as adverse evaluations or low personnel ratings, are primarily or substantially predicated upon activity which may reasonably be characterized was protected free speech, these decisions are likely to be challenged as violations of the applicant's first amendment rights.

The Bellview School District scenario has some similarities with a case in which a blind tenured teacher sought placement on his school district's list of administrative candidates. The district required a written exam and an interview for placement purposes. Despite the assistance of a reader, the teacher placed in the lowest quartile on the examination, and, following an interview, the school district's administrative committee refused placement on the list. While there was discussion during the interview of how the teacher's blindness would influence performance of administrative duties, the teacher emphasized that he would handle any difficulties with the help of an aide.

The federal district court found no evidence of a blanket prohibition against the hiring of a blind administrator, and concluded that the teacher's blindness was not the determining factor in the administrative committee's determination to deny placement on the list of administrative candidates. No violation of the Rehabilitation Act was established since the teacher's low ranking on the district's placement examination established that he was not an "otherwise qualified" handicapped applicant. While questions in the interview made reference to the limitations imposed on the teacher by his handicap, the court concluded it was reasonable for the committee to inquire how the applicant would handle job responsibilities given his disability.[32]

An activity which would appear prohibited by the Rehabilitation Act's regulatory provisions would focus on a preemployment inquiry[33] as to whether an applicant had a previous mental or physical impairment.[34] In a specific case, an applicant for a teaching position was rejected by the school district after disclosure that he had received treatment for a nervous breakdown while in the military, despite an examination by the school district physician who found the applicant physically and mentally qualified for the position. In a federal district court's view, the school district could be enjoined from making inquiries about treatment for a previous psychological disorder unless

32. Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979).

33. For an analysis of legal standards applicable to preemployment inquiries, *see* J. Horton & V. Corcoran, Preemployment Inquiries: Avoiding Pitfalls in the Hiring Process (NOLPE Monograph 1984).

34. *See* 45 C.F.R. § 84.14 (1979).

shown to be clearly related to an applicant's ability to perform job-related functions.[35]

The Bellview School District's policy requiring administrators to qualify as substitute school bus drivers would be subject to challenge under the Rehabilitation Act on the ground that even if such a qualification were found to be a reasonable job-related requirement, it would violate the school district's affirmative duty to undertake reasonable accommodations for a handicapped person who was otherwise qualified for a position. In a case involving a school district's decision not to hire a handicapped special education teacher because of a requirement that he obtain a bus driver's permit, a federal district court ruled that the duty to accommodate handicap is an even greater duty when the school district is a recipient of federal funds under the Education of All Handicapped Children Act.[36]

The Bellview superintendent's testimony that the applicant's low rating is substantially due to a single negative evaluation predicated upon activity as a union representative admits to a powerful inference that the applicant's first amendment rights have been violated. Courts have been particularly scrupulous in protecting union representatives from adverse employment decisions based upon bargaining, unionization or grievance activity.[37] While an employee's comments on matters of public importance continue to be protected free speech,[38] it would appear that when the public school employee speaks only on matters of personal interest, courts will be reluctant to question the personnel decision taken in reaction to the employee's speech.[39] Thus, there are situations in which consideration of an employee's speech would be proper and relevant considerations in evaluation or assessment, but not so in the situation described in the hypothetical.

Case Scenario Three

Rolling Hills School District

Although certified, a black assistant principal in the Rolling Hills School District has not been recommended for a vacant position as a principal in three separate instances over a three-year period. Recommendation has been based upon an interview and

35. Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981).

36. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).

37. *See, for example,* Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984); Brown v. Bullard Indep. School Dist., 640 F.2d 651 (5th Cir. 1981); Columbus Educ. Ass'n v. Columbus City Schools, 623 F.2d 1155 (6th Cir. 1980); and Hickman v. Valley Local School Dist., 619 F.2d 606 (6th Cir. 1980).

38. Pickering v. Board of Educ., 391 U.S. 563 (1968).

39. *See* Connick v. Myers, 103 S. Ct. 1684 (1983).

evaluation by the district's assessment team. The team gives equal weight to three factors in the selection process: a minimum score on a nationally-standardized I.Q. test, a minimum score on the National Teacher Examination, and an interview rating based upon scoring of an evaluation instrument. The evaluation instrument used by the assessment team is based upon a form used for teacher evaluation, but modified to reflect characteristics and qualities of a principal. In the first two cases in which the black applicant was not recommended, the applicant was advised that he had not met the minimum score on either the NTE or the I.Q. test, thus no interview was necessary. In the third instance in which the applicant was not recommended, he was advised that although he met the assessment team's requirements he was not recommended because a black vice principal was already assigned to the school which had a vacancy and a white principal was needed.

Narrative

Disparate treatment and disparate impact provisions of Title VII are implicated in case scenario three. The Rolling Hills assessment and selection procedures may be deemed to be racially discriminatory based upon a number of factors which have a cumulative evidentiary impact. Although not indicated, it would be helpful to know the historical background and current context of this district's employment practices, since evidence of a past history of *de jure* segregation; a statistical showing that black employee assignments were concentrated in schools with large black student populations, or that the tests used for purposes of personnel recommendations had an adverse impact on a particular minority would support a finding of invidious discrimination.[40]

In a case which involved aspects of the Rolling Hills scenario, a black educator's employment discrimination suit was remanded on a claim of discrimination under the Civil Rights Act,[41] for a determination of whether race played a role in the staffing of one principalship for which the black applicant was qualified. The record indicated that a white applicant of similar qualifications was selected because of a certificate of service with more years than the black applicant, however, the school district's witness conceded that such a certificate was *not* required in order to perform the job of principal. Given this information, together with testimony that a white principal was needed at the school in question because a black assistant principal was already at the school, the court remanded for a consideration of a genuine issue of fact.[42]

40. *See* Lee v. Conecuh Cty. Bd. of Educ., 634 F.2d 959 (5th Cir. 1981).
41. 42 U.S.C. § 1981 (1964).
42. Stafford v. Muscogee Cty. Bd. of Educ., 688 F.2d 1383 (11th Cir. 1982).

A Pennsylvania school district was held to have discriminated on the basis of race and sex in its failure to interview and hire a black woman for a position as an instructional supervisor of special education. The state appeals court ruled that the applicant had established a *prima facie* case of sex and race discrimination by showing that she met all requirements for the position at the time her application had received school district consideration, but the district had selected a white male applicant on the recommendation of the district's acting director of special education. The male applicant selected for the position had been interviewed in the previous year, but the position had remained vacant due to insufficient funding.

In finding the district's proffered reasons for rejecting the black female applicant to be pretextual, the state court gave consideration to the unstructured interviews conducted in the previous year's application process, noted the district's use of subjective criteria from which interviewers were to develop a "gut" reaction to the candidates and the lack of any credible basis for failing to interview the obviously qualified black female applicant. This evidence supported the view that the district had preselected the white, male applicant and engaged in unlawful sex and race discrimination in its assessment and selection practices.[43]

A black teacher brought alternate Title VII theories on the ground she had been denied employment with a district because of her race. Statistical evidence showed that black teachers were concentrated in schools with large populations of black students. Three of thirty-seven schools employed more than 50% of the district's black teachers. The teacher applicant claimed employment opportunities for black teachers were limited to those schools with a substantial number of black students. The federal appeals court applied the disparate impact test of Title VII, requiring that the district prove business necessity for its hiring practices. Under such a standard, the district would be required to show that the hiring practice was essential and the purpose for the practice compelling.[44] While a hiring system based upon a commitment to an affirmative action plan could be sustained under the business necessity test, it is unlikely that the practice of denying employment to a minority could be justified.

Although the use of personnel ratings based on test scores is a recognized practice in many school districts, the factors which influence the composite rating at Rolling Hills are suspect. Is an I.Q. test

43. Harrisburg School Dist. v. Commonwealth of Pa., 446 A.2d 760 (Pa. Commw. Ct. 1983).
44. Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981).

reasonably related to job requirements? Would scores on the NTE have a valid relationship to the duties of a school administrator or the personnel objectives of the school district? While no definitive answer to these questions is available, the use of these scores is subject to legal challenge.

The use of an I.Q. test and the utilization of the NTE as a basis for promotion and hiring decisions has been subject to federal court review in cases involving racially disparate impact. The United States Supreme Court ruled against the use of I.Q. test in promotion to supervisory positions at an electric utility after a showing that the use of the test had a discriminatory impact on a racial minority and could not be shown to meet the business necessity test of Title VII.[45] The use of the NTE would be inappropriate if designed to identify effective administrators or teachers, but courts have upheld use of the test in teacher certification and pay raise cases where the objective of the minimum score requirement was designed to provide an incentive to master subject matter related to the study of education and qualify a teacher as meeting a minimum level of knowledge within a subject matter area related to job requirements.[46] While use of the I.Q. test as an employee assessment and selection device could probably be prohibited upon a showing that it was unrelated to reasonable requirements for a job, the use of the NTE may be permissible if the school district is willing to meet the requirements outlined in *United States v. South Carolina*[47] to establish the validity of the test, the reasonableness of the cut-off score and the business necessity for the use of the assessment instrument.

Finally, it may be argued that the use of a teacher evaluation instrument modified to reflect characteristics of the principal is arbitrary, unfair and unreasonable. While the question of whether such an instrument could be shown to be reasonably related to job requirements would be at issue, it is unlikely that a court would be willing to find that such a practice violates standards of reasonableness based solely on the information give in the hypothetical. The applicant would be required to demonstrate the arbitrary or unreasonable nature of the practice, going beyond a proof that the evaluation instrument had

45. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Supreme Court held that such a test must "bear a demonstrable relationship to successful performance of the job for which it is used."

46. *See* Newman v. Crews, 651 F.2d 222 (4th Cir. 1981) (pay raises); and United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd* 434 U.S. 1026 (1978) (certification); *but see* York v. Alabama State Bd. of Educ., 581 F. Supp. 779 (M.D. Ala. 1984) (prohibition of minimum score on NTE as a teacher renewal device).

47. 445 F. Supp. 1094 (D.S.C. 1977).

initially been intended to apply to teaching and establishing that the instrument as modified bore no reasonable relationship to the job requirements associated with the principalship.[48]

48. *See* Brown v. School Dist. of Cheltenham, 417 A.2d 1337 (Pa. Commw. Ct. 1980).

IV.

Conclusions and Suggested Guidelines

The previous hypothetical case scenarios, coupled with citations to relevant cases, may lead the professional educator to the conclusion that school district assessment and selection procedures are highly vulnerable to legal attack. While legal constraints, particularly those associated with claims of discriminatory practice, may be formidable, compliance with the law can be realized through an emphasis on the adoption of reasonable professional practice standards and the application of uniform procedures. A sampling of cases in which school districts have prevailed against challenges to the assignment and selection process may be illustrative.

Anna Parker was one of eight females in a group of twenty-six school personnel selected for initial interviews to fill three positions as secondary school vice-principals in the Indianapolis public schools. The selection committee rated and ranked Parker tenth among the candidates, with three other female applicants above her. Although a teacher with forty-three years' experience and education beyond the master's degree, she had no supervisory experience within the school system. Based upon the selection committee's rankings, an independent review of the candidate's personnel file and a review by the district's affirmative action officer, the district superintendent recommended three candidates, two men and one woman, for the positions. All the recommended candidates were ranked higher than Parker. Among the considerations in rating and ranking applicants was an interview which assessed job-related though subjective criteria.

The Seventh Circuit Court of Appeals ruled that the school system's failure to hire Parker for a position as vice-principal was not sex discrimination under Title VII.[49] The school district met its responsibility to articulate a legitimate nondiscriminatory reason for its hiring practice. In this instance, the school district met its burden by showing that the male applicant had superior qualifications for the position as

49. Parker v. Board of School Comm'rs of Indianapolis, 729 F.2d 524 (7th Cir. 1984).

vice-principal, all of which were job-related and announced criteria for the position. These qualifications included seven years of relevant supervisory experience, certification beyond that required for the position and completed coursework for a Ph.D. in curriculum. Furthermore, the district presented statistical evidence showing that the percentage of females employed who met the minimum requirements for vice-principal and other administrative positions in the school district closely approximated the percentage of females actually holding those positions.

The appellate court took particular notice of the fact that detailed procedures utilized to fill the vice-principal positions provided further evidence of the school district's nondiscriminatory policies. Despite the use of an all-male interview committee and allegedly "subjective" criteria used to select and rate candidates, the court regarded the employer's selection procedures as consistent with the law. The court's final observations reflect the role the court assumed:

> Ms. Parker clearly has had a distinguished career as an educator and has been a dedicated employee of the IPS and Arsenal Technical High School. Our task, however, is not to assess the "wisdom" of employment decisions, but rather to determine whether an employer's selection procedures comport with the law. Based upon the record presented to use for review we are compelled to hold that the procedures followed by the IPS to hire a new vice-principal for Tech High School did comport with the law.[50]

The Eighth Circuit Court of Appeals reversed a finding of sex discrimination violative of Title VII in a case involving a school district's decision to hire a male over a female applicant for a vacant position as principal. The two finalists for the position were evaluated by the Director of Secondary Education and an interview committee of male and female teachers from the school district. Although the committee initially supported the female applicant based on unstructured interviews, the male applicant was nominated following reference checks which tended to indicate that the female applicant was inflexible, had certain staff relations problems and was insensitive to student needs. The district court held that the proffered nondiscriminatory reasons for denying the vacant position to the female applicant were a pretext which attempted to mask a discriminatory purpose. The circuit court reversed, holding the district court's decision clearly erroneous in its failure to give sufficient credence to evidence that the male applicant

50. *Id.* at 529.

was better qualified because he had seven years experience as a high school principal (the female candidate had five years experience as an assistant principal) and evidence of negative references on the female applicant.[51]

Although initially successful in establishing a *prima facie* case of age and sex discrimination, a part-time teacher lost her *pro se* appeal from a decision dismissing her claim with prejudice. In response to plaintiff's *prima facie* proof of discrimination, the school district presented what the trial court described as "overwhelming" evidence that the denial of a position to the teacher was free of unlawful discrimination. The record showed that the teacher had been a disruptive rather than contributive factor in the school system, and the trial court found that the teacher was denied renewal because of her unwillingness to observe rules and regulations, failure to work harmoniously with other staff and refusal to submit documentation essential to her employment. Finding no error, the Eighth Circuit Court of Appeal affirmed.[52]

A federal district court ruled that the procedures used by a Connecticut school district to select the chairperson of a combined middle-school and high school science department were not shown to have unfairly discriminated against a female science teacher who had applied for the position. The court found the procedures and selection processes used by the school district to be gender-neutral even though subjective judgments of a screening committee influenced the choice of candidate appointed to the position. Although the female teacher established a *prima facie* case showing that she applied for the position and was otherwise qualified, she was unable to carry the ultimate burden of proving intentional discrimination, particularly in light of the school board's showing that the two candidates recommended for the position were more qualified than the plaintiff. Notwithstanding plaintiff's showing that selection committee judgments were influenced by subjective factors and that none of the other department chairs were women, the court concluded that there was credible evidence that the board had acted on the basis of legitimate, nondiscriminatory grounds in its selection process.[53]

Mary Love, a black female teacher in a North Carolina school system, was unsuccessful in seeking appointments to administrative positions as an elementary school principal at various district elementary schools. She applied and was considered for several administrative

51. Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 706 F.2d 813 (8th Cir. 1983).
52. Scharnhorst v. Independent School Dist. No. 710, 686 F.2d 637 (8th Cir. 1982).
53. Negal v. Avon Bd. of Educ., 575 F. Supp. 105 (D. Conn. 1983).

positions between 1970 and 1983. In each instance, the school system contended that she either applied too late for consideration, withdrew her application or was considered along with other candidates but was ultimately denied the position because she was less qualified. In those cases in which the teacher was deemed less qualified, a factor in the selection process was an interview with a panel of administrators selected by the school district. The interview was unstructured, utilizing broadly phrased selection criteria without instruction or guidance on the meaning to be given to criteria or on how to compare applicants using the criteria.

The federal district court held that in each instance in which the teacher had sought promotion to an administrative position she had either failed to apply, ineffectively applied or was found to be a lesser qualified applicant based on legitimate criteria advanced by the district. As to the use of subjective criteria in the system's selection procedures, the court noted that the use of such criteria, where job-related, is not illegal under the civil rights laws. While the school district did fail to establish written job descriptions and articulate qualifications for the administrative positions, subjective judgments involving employment decisions would not give rise to a *per se* finding of discriminatory intent. In Love's case, job-openings were posted and minorities were encouraged to apply. Blacks and females customarily held positions on the administrative interview committees. Statistical evidence of hiring practices and a review of existing positions in the district failed to establish any pattern of discrimination in employment. Witness testimony established that the selection procedures were uniformly applied and even the plaintiff, Ms. Love, characterized her interview sessions as job-related. Given these findings the court was unwilling to conclude that the school district's selection procedures were racially or sexually discriminatory.[54]

Legal Guidelines in Assessment and Selection

A number of factors may influence a court to examine a school district's assessment and selection practices: the absence of written job descriptions and qualifications, lack of adequate notice of job vacancies or opportunities, unsupported employment decisions or decisions based upon subjective criteria which appear unrelated to job requirements. In many cases, any one of these factors may be coupled with

54. Love v. Alamance Cty. Bd. of Educ., 581 F. Supp. 1079 (M.D.N.C. 1984).

statistical evidence of a hiring or promotion preference for majority applicants in order to establish a *prima facie* case of discrimination.

Development of, and adherence to, a systematic procedure relative to employee assessment and selection is an organized obligation of high priority. Applicable law relating to the development of such a system should include contractual, administrative, statutory and constitutional arrangements which may vary from state to state and locality to locality. Evolving case law in this area can be usefully reviewed in order to extrapolate a set of uniform guidelines which can be generalized across jurisdictions. The importance of procedural safeguards and job-related criteria in the assessment and selection process are particularly evident in the guidelines that follow.

1. The assessment and selection process should be formalized in advance of implementation, consisting of written policies defining criteria that are reasonably related to job requirements and school system goals and objectives.

2. Criteria for assessment and selection should be developed from a thorough job analysis and shown to be job-related through content or empirical validation procedures.

3. Subjective criteria should be considered as but one component in an overall assessment and selection system and should be susceptible to an inference of job relatedness.

4. Assessment and selection practices should utilize observers who are trained to interview, observe and evaluate applicants and knowledgeable about job requirements.

5. The assessment and selection process should be uniform in application to all applicants.

6. Assessment and selection policies must not be invidiously discriminatory and should emphasize equality of opportunity at all phases of the process.

7. Applicants should be fully informed of the criteria and procedures associated with the assessment and selection process.

8. State statutory mandates, administrative rulings and collective bargaining agreements specifically establishing procedures and standards for the assessment and selection process should be strictly followed.

9. A documentary record of the assessment and selection process should be maintained.